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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 746.

JAMES L. WERNER,
Petitioner,

v.

STATE OF OHIO,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari To the Court of Appeals, Geauga County, Ohio, Seventh Judicial District of Ohio.

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STATEMENT OF FACTS.

On February 8, 1958, Roger L. Frohring died accidentally. His widow, Frances B. Frohring, retained the law firm of Werner and Smith, Chardon, Ohio, to aid her in administering his estate. Her initial contact was with Ced L. Smith, but thereafter the petitioner James L. Werner handled the client relationship almost exclusively. The original Will of Roger L. Frohring was stolen prior to his death. Thieves had made off with a safe in which the original had been kept. A copy of the Will, which had been prepared by the Cleveland law firm of Falsgraf, Kundtz, Reidy and Shoup (R. 37), was admitted to probate on May 10, 1958. On May 20, 1958, Frances B. Frohring was approved as the executrix. On May 28, 1958, the Inventory and Appraisal was filed showing that the estate consisted of the following assets:

PERSONAL PROPERTY:	
Chevrolet station wagon	$ 900.00
Truck	1,200.00
STOCK:	
Newbury Industries, 1600 shares	30,176.00
Newbury Hardware, 76 shares	9,880.00
American Home Products, 1350 shares	122,850.00
First National Bank of Burton, 10 shares	600.00
REAL ESTATE:	114,750.00
TOTAL	$280,356.00

On June 3, 1959, an Application for the Determination of the State Inheritance Tax was filed. In addition to the assets already named, it included the following items which were subject to tax:

Joint checking account	$ 4,838.19
Insurance contract	59,780.00

Among the deductions on the Application for Determination of Inheritance Tax was listed $26,300.00 for Federal Estate Tax. Petitioner testified he did not think that a Federal Estate Tax was due (R. 65). Nevertheless it was listed as a deduction (R. 65). He never prepared the Federal Estate Tax forms, nor was a Federal Estate Tax declaration ever filed, nor was the tax paid. On June 17, 1963, the State Inheritance Tax of $5,523.66 was paid, including interest of $1,036.77.

On May 5, 1958, Frances B. Frohring received $55,492.58 in the form of an insurance check payable to her as the beneficiary of her deceased husband's life insurance. Of this she used approximately $16,500.00 to pay a debt to The First National Bank of Burton, and the balance of $38,000.00 she turned over to James L. Werner in the form of a bank check payable to him. On June 8,

1959, the Newbury Hardware stock in the estate was sold for $12,000.00, $8,000.00 of which was in the form of a check payable to Frances B. Frohring and the balance of $4,000.00 in the form of a promissory note payable to Frances B. Frohring. The $8,000.00 check was endorsed by Frances B. Frohring and turned over to James L. Werner.

On July 11, 1958, the petitioner opened a brokerage account with Paine, Webber, Jackson and Curtis in the name of Frances B. Frohring, with instructions to the brokerage firm to send all checks and communications to him. The petitioner failed to return forms required by the brokerage house which were supposed to have been signed by Mrs. Frohring indicating her approval that said checks and other communications be sent directly to petitioner. Frances B. Frohring never knew of the Paine-Webber account.

On July 11, 1958, the petitioner opened a savings account with the Security Federal Savings & Loan Association, Chardon, Ohio, in the name of James L. Werner, Trustee for Frances B. Frohring, in the sum of $10,000.00. Frances B. Frohring never knew of this account. On February 9, 1960, on February 24, 1960, and on February 25, 1960, the petitioner received checks in the respective sums of $15,909.15, $14,635.97, and $22,822.89 from Paine, Webber, Jackson and Curtis, which had acted as the brokerage house in the sale of American Home stock for $53,368.01. Each check was payable to Frances B. Frohring, bears her forged endorsement, and the second endorsement bears the stamp of the Geauga Broadcasting Company, a corporation owned and controlled by the petioner and his wife.

On June 23, 1959, the petitioner received a Paine-Webber check dated June 22, 1959, for $10,000.00 payable

to Frances B. Frohring, bearing her forged endorsement and the stamp of Werner and Smith as the second endorser. This check was negotiated June 23, 1959. This check was deposited to the account of Werner and Smith and their testimony is that it represented attorneys' fees, of which $6,500.00 went to the petitioner and $3,500.00 to Smith. Frances B. Frohring never knew of this check or that Werner and Smith were paid the sum of $10,000.00 in attorneys' fees.

Petitioner admitted negotiating each of the Paine-Webber checks (R. 616). He admitted that each Paine-Webber check payable to Frances Frohring was sent directly from Paine, Webber, Jackson and Curtis to him. Both the State and defense handwriting experts agree that Frances Frohring's endorsement on each Paine-Webber check is forged.

On September 28, 1959, the petitioner withdrew $10,000.00 from the said Security Federal Savings & Loan Association Trust Savings Account, payable to himself as an individual. This was endorsed "James L. Werner" and sent to the Central National Bank of Cleveland, which acted as escrow agent for the deposit of funds in the formation of The Geauga County National Bank. Petitioner admitted this $10,000.00 was added to $15,000.00 of other funds to enable him to buy $25,000.00 worth of stock in said bank in his name as an individual. This purchase of stock enabled the petitioner to become a director in said bank. Frances B. Frohring was never informed of this transaction involving money held in trust for her. On February 14, 1962, a Paine-Webber check in the sum of $8,200.00 payable to Frances B. Frohring, bearing her forged endorsement and the second written endorsement "Geauga Broadcasting Company by James L. Werner," was negotiated. On March 5, 1962, a Paine-Webber check

in the sum of $7,166.60, bearing Frances B. Frohring's forged endorsement and the second endorsement of James L. Werner, was negotiated. On June 1, 1962, a Paine-Webber check in the sum of $12,249.38 payable to Frances B. Frohring, bearing her forged endorsement and the second endorsement of James L. Werner, was negotiated. Mrs. Frohring knew of none of these checks, nor that they had been forged, nor that the petitioner James L. Werner had received the benefit of same.

In early 1958 the Geauga Broadcasting Company was incorporated, the incorporators being James L. Werner, his wife, and Ced L. Smith. The petitioner and his wife were officers and directors. Ced L. Smith was named Vice-President and Fred Austin was named the Treasurer. The issuance of stock was never recorded with the Securities Division of the State of Ohio. The petitioner maintained that money he received from Frances B. Frohring was received with her knowledge and that she was credited with $40,000.00 worth of stock and $30,000.00 worth of debentures in said Geauga Broadcasting Company. No stock nor debentures were ever issued to Frances B. Frohring, nor were they ever filed with the Securities Division of the State of Ohio. However, Mrs. Frohring did receive monthly interest payments beginning in early 1960 which she understood to be interest for debentures in said broadcasting company. Neither Ced L. Smith, who was an officer in said broadcasting company, nor Fred Austin, who was the treasurer of said company, knew of the debentures or of the stock interest supposedly had by Frances B. Frohring. They testified that they had no knowledge that Mrs. Frohring had any interest in the broadcasting company, nor had they any knowledge that any of her money was being used in the broadcasting company (R. 143, 133).

According to Mr. Austin the Ownership Report was filed with the Federal Communications Commission in 1961 (R. 130) and the report indicated that only the petitioner and his wife were the owners or had an interest in said broadcasting company. However, the petitioner testified that the debentures were issued to Mrs. Frohring in February of 1960. The evidence also shows (R. 145) that Ced L. Smith, member of the firm of Werner and Smith, had no knowledge of the Paine-Webber account in the name of Mrs. Frohring, nor had he any knowledge of the savings account in the Security Federal Savings and Loan Association. Mr. Smith testified that it was customary with the firm for the fiduciary to open a fiduciary account in the administration of an estate, but in the handling of the Frohring estate no fiduciary account was opened (R. 152). Instead, the funds from the Estate of Roger L. Frohring and from Mrs. Frohring as an individual were co-mingled in the James L. Werner escrow account with other funds.

On April 1, 1963, Frances B. Frohring was committed to Fairhill Hospital as being incompetent and a guardian was appointed for her, said guardian being her daughter, Jean Sargent. Mrs. Sargent retained the law firm of Falsgraf, Kundtz, Reidy and Shoup of Cleveland to represent her in the guardianship proceedings. In order to prepare the income tax and to prepare the inventory for the guardianship, Mr. William Falsgraf attempted to get information from the petitioner. On June 12, 1963, Mr. Falsgraf sent the demand to the petitioner, signed by the guardian, Jean Sargent, and by Frances Frohring. It reads as follows and is reported on R. 42:

"Dear Mr. Werner:

"I want you to turn over to William Falsgraf all of the documents, tax returns, check books and other

records which you have in your possession and which pertain to the administration of the estate of my late husband, Roger Frohring. I also want you to turn over to Mr. William Falsgraf any stock certificates, savings or check books or other records which you might have in your possession pertaining to my personal affairs.

"Very truly yours,
"Frances Frohring
"Frances Frohring, Executrix
of the Estate of Roger Frohring
"Jean Sargent,
Guardian of Frances Frohring"

This letter is State's Exhibit 3.

On June 18, 1963, in response to this letter, a recapitulation or accounting prepared by defendant, which is State's Exhibit 4, was delivered to Mr. Falsgraf (R. 45). This accounting represented that the petitioner received $65,720.97 from Mrs. Frohring and from the Estate of Roger Frohring, and that he paid out said sum and itemized such disbursements. Gradually Mr. Falsgraf became aware of other assets which were not indicated in said first accounting. He learned that the American Home Products stock had been sold for $53,366.91. He did not learn this from the petitioner. He learned it from the transfer agent which informed Mr. Falgraf that Paine, Webber, Jackson and Curtis was the brokerage house handling the sale of said stock. By checking with Paine, Webber, Jackson and Curtis, Mr. Falsgraf learned of the brokerage account in the name of Frances B. Frohring.

He learned of the $38,000.00 that was turned over to the petitioner from the life insurance proceeds received by Mrs. Frohring as beneficiary of her deceased husband. He learned of the sale of the Newbury Hardware stock

which resulted in $8,000.00 in cash being turned over to the petitioner. He learned of the sale of Newbury Industries stock in the amount of $37,720.00, the sale of which was handled through the Cleveland Trust Company, the proceeds which were sent directly to the petitioner. Thus, by intensive searching, Mr. Falsgraf was able to discover that the petitioner, instead of having received approximately $65,000.00, had received over $137,000.00 of funds from the Roger L. Frohring Estate and from his widow, Frances B. Frohring.

So, Mr. Falsgraf then again approached the petitioner and confronted him with these facts and asked him to account for these other moneys which he had received. On September 23, 1963 (R. 92) (Exhibit 16), for the first time the petitioner revealed that Frances B. Frohring had an interest in Geauga Broadcasting Company in the form of $40,000.00 in stock. He maintains that the debentures were issued, but admits that the stock was never issued. Thus, the petitioner attempted to account for the approximately $137,000.00 that he now admitted he received by indicating the disbursements of $65,720.97, which constitutes State's Exhibit 4, and, in addition to that, $70,000.00 of which he alleged $40,000.00 was stock and $30,000.00 debentures in the Geauga Broadcasting Company. On or about November 23, 1963, a civil suit for damages was filed against the petitioner and others for the recovery of moneys misappropriated in the handling of the Estate of Roger L. Frohring and of the personal funds of Frances B. Frohring as an individual. On December 17, 1963, Mr. Falsgraf arranged to take the deposition of the petitioner. In the meantime, Mr. Falsgraf, since the second accounting of September 23, 1963, discovered that the petitioner had made a profit of $14,667.57 on the Paine-Webber account, and, during the taking of the deposition, confronted Mr.

Werner for the first time with this information. The petitioner stated that this sum was accounted for as follows: "to apply against future shares of Geauga Broadcasting Company." This so-called third accounting constitutes State's Exhibit 19. It should also be noted that in petitioner's second accounting (Ex. 16) he lists the proceeds of sale of American Home Products stock at $52,000.97, whereas in his third accounting (Ex. 19) he lists it at $53,368.01.

ARGUMENT.

Before taking up the questions presented for review by petitioner, the respondent will briefly go into the merits of the case. Petitioner cites *Cuyahoga River Power Co. v. The Northern Realty Co.*, 244 U. S. 300 (1917) as authority that the judgment of the Court of Appeals for Geauga County, Ohio, becomes the final judgment of the highest court of the State of Ohio. This case also provides:

> "Where grounds are broad enough to sustain the judgment irrespective of the merits of the Federal question involved in the defense, the Federal Supreme Court will not take jurisdiction of a writ of error to a state court."

This respondent contends that the following acts or failure to do acts, when taken together with the circumstances of the forged Paine-Webber checks, prove petitioner guilty beyond a reasonable doubt of embezzlement on eight separate counts.

a. The petitioner's failure to file in Probate Court any account within the five years he was attorney for the Estate of Roger L. Frohring.

b. The petitioner's failure to prepare and file a federal estate tax, although he knew that this was necessary, since

he had listed it as an exemption in preparing the application for determination of the State inheritance tax.

c. The petitioner's failure to file a timely application for determination of State inheritance tax and his further delay of two and one-half years to pay said tax, thus incurring interest payments.

d. The petitioner's failure to file an estate income tax return in any of said years.

e. Petitioner's failure to file income tax returns on behalf of Frances B. Frohring within said five-year period.

f. The petitioner's failure to file personal property tax returns on behalf of either the estate or on behalf of Frances B. Frohring.

g. The payment to petitioner of $10,000.00 as attorney's fees without an application nor approval for payment of attorney's fees by the Probate Court.

h. The petitioner's opening of a Paine-Webber account in the name of Frances B. Frohring in the approximate amount of $11,000.00 without her knowledge and the petitioner's failure to return to the Paine, Webber, Jackson and Curtis people the form which they required to be signed by Frances B. Frohring indicating her desire that all correspondence and checks be sent to the petitioner. Neither his secretary, Mrs. Marlene Smith, nor his partner, Ced L. Smith, knew of this Paine-Webber account.

i. The circumstances whereby Paine-Webber checks were sent directly to the petitioner in the total sum of over $90,000.00 which were made payable to Frances B. Frohring. The additional fact that each Paine-Webber check bore the forged endorsement of Frances B. Frohring, and bore the second endorsement of either the petitioner or his wholly controlled corporation; and that the petitioner admitted negotiating each of said checks. It should be

further noted that almost without exception each of the Paine-Webber checks were negotiated the day after they were written.

j. The petitioner's use of the proceeds of the checks, either for Geauga Broadcasting Company or for himself, with no authority from Frances B. Frohring having been given to him.

k. The lack of covering letters, notes or other writings to back up the petitioner's contention that Frances B. Frohring consented to his use of her funds in this manner.

l. The failure of the petitioner to issue stock or debentures to Frances B. Frohring and, further, his failure to produce letters, notes or other writings to back up his contention that over $86,000.00 of Frances Frohring's funds were used by Geauga Broadcasting Company.

m. The failure to register Geauga Broadcasting stock with the Securities Commission of Ohio.

n. The failure to register with the Federal Communications Commission the alleged interest of Frances B. Frohring in Geauga Broadcasting Company.

o. The petitioner's withdrawal of $10,000.00 of Frances B. Frohring's funds from the Security Federal Savings and Loan Association trust account and the use of said funds to buy stock in The Geauga County National Bank in the petitioner's name.

p. The complete lack of any note or other corroboration that this withdrawal of $10,000.00 of funds which petitioner was holding in trust for Frances B. Frohring was done on a loan basis with the consent of Frances B. Frohring.

q. The complete lack of cooperation and evasiveness in petitioner's dealings with William Falsgraf when Mr.

Falsgraf took over as attorney for the guardian of Frances B. Frohring in April of 1963 and thereafter.

r. The manner in which the petitioner responded to the demand of Mr. Falsgraf and his client, Jean Sargent, guardian of Frances B. Frohring, and Frances B. Frohring, for the petitioner to turn over all of the documents, tax returns, check books and other records which the petitioner had in his possession and which pertained to the administration of the Estate of Roger Frohring, and also the demand for the petitioner to turn over to Mr. Falsgraf any stock certificates, savings or check books or other records which the petitioner might have in his possession pertaining to the personal affairs of Frances B. Frohring.

s. The lack of knowledge of the petitioner's secretary, Marlene Smith, or his partner, Cedric L. Smith, who was also an officer of Geauga Broadcasting Company, and of the Treasurer of Geauga Broadcasting Company, Fred Austin, that Frances B. Frohring had any interest in Geauga Broadcasting Company or that she had loaned any money to Geauga Broadcasting Company or that she had allegedly authorized the petitioner to invest any of her funds in Geauga Broadcasting Company.

We turn now to the questions presented for review by the petitioners.

1. Was petitioner's constitutional right against self-incrimination violated when his testimony, books and records, taken pursuant to a deposition in a civil suit, were presented to a grand jury at a later date against his will and without his permission?

First, there is nothing in the record indicating that such presentment was made against petitioner's will. In fact the grand jury returned a secret indictment and the petitioner had no prior knowledge of such presentment.

Second, there is nothing in the record indicating that the contents of petitioner's deposition was of an incriminating nature. At no time has petitioner specified that any portion of said deposition incriminated or tended to incriminate him. Petitioner is an attorney and was an attorney when the deposition was taken in the civil matter. He had the knowledge and the right to exercise his constitutional right against self-incrimination during the taking of said deposition. The fact that he did not so exercise said right would indicate one of two things—that he waived the right or that no incriminating matters are contained therein.

Third, the deposition was not used in the trial before three judges and yet the petitioner was found guilty beyond a reasonable doubt. The conclusion to be drawn from this is that there was ample other evidence presented to the grand jury to justify its findings of probable cause for an indictment if there was sufficient other evidence to prove guilt beyond a reasonable doubt.

The opinion of the Court of Appeals of Geauga County, Ohio, answers this question for review and the other two questions presented far better than can this briefer. Said opinion is set forth in petitioner's Appendix A.

2. Was the petitioner denied due process when his attorney was prohibited from inquiring into the extent of the use of the deposition, books and records, attendant thereto before the grand jury and further prohibited from inquiry into testimony elicited before the grand jury of a mentally incompetent witness who had not been examined by the trial court as to competency prior to such testimony?

Petitioner's plea in abatement (Appendix I) states that his deposition was presented to the grand jury and

that the testimony of an alleged incompetent person was heard by the grand jury. This statement was not contested and therefore inquiry into the extent of the use of the deposition and the testimony was not germane.

Petitioner cites *Denis v. United States*, 16 L. Ed. 2d 973, to back his contention that he should have been permitted to examine the grand jury record. But in the *Denis* case examination was found to be necessary for the purpose of impeachment of the prosecution witnesses. This was not the purpose in the instant case and as has already been stated nothing was to be gained because the fact of the use of the deposition and the testimony of an alleged incompetent was not in dispute. *Pittsburgh Plate Glass Co. v. United States*, 360 U. S. 395, 400; 3 L. Ed. 2d 1323, 1327; 79 S. Ct. 1237, cited by petitioner provides in part that "any disclosure of grand jury minutes is covered by Rule 6(e) of the Federal Rules of Criminal Procedure, which is declaratory of the pre-existing rule that disclosure is committed to the discretion of the trial judge." The question should then be—did the trial judge abuse this discretion? The answer must be—no.

See also *Schmidt v. United States*, 115 F. 2d 394, Syll. 4, which states:

> "The responsibility for relaxing the rule of secrecy of grand jurors' deliberations and supervising any subsequent injury concerning them resides in the court of which the grand jury is part, and such matter appeals to the court's discretion when brought to its attention."

The alleged mentally incompetent witness was not adjudged incompetent, contrary to petitioner's allegation. A guardian had been appointed for her prior to her testifying before the grand jury and she remained under guardianship when she testified before the three-judge trial court.

Her status had not changed in the interim. The trial court found her capable of taking the stand and her testimony was not stricken.

In 97 *C. J. S.* (Witnesses) Sec. 119 it is stated:

> "The determination of the question of the competency of a witness is largely or almost wholly in the exercise of the discretion of the court."

3. Was the petitioner denied due process in violation of his constitutional rights by the refusal of the trial court to grant his motion to quash the indictment or to compel an election thereunder because of the improper joinder creating a multiplicity and duplicity of counts?

This is not a question which should invoke the jurisdiction of the Federal Supreme Court. The Court of Appeals considered and rejected this question and the State Supreme Court refused to hear it. This is the reason petitioner found no Federal Supreme Court cases on this question.

There is no inconsistency, multiplicity or duplicity here. Petitioner got possession of the Paine Webber checks in the course of his employment as attorney for the payee of the checks. It was after he obtained legal possession of the checks that the endorsements were forged and the checks were uttered. A check is a thing of value which may be the subject of embezzlement. If the acts done in the process of converting said checks to petitioner's use was the act of forgery and the act of uttering the forged checks, they are all separate acts, separate criminal intents and not inconsistent with each other.

Petitioner's citation of *Sheppard v. Maxwell*, 16 L. Ed. 2d 600, 86 S. Ct. 490, is entirely irrelevant to this case. There is nothing in the record indicating this case was

sensational. It was petitioner's choice to have a three-judge court rather than a jury hear his case.

It is respectfully submitted that petitioner's petition for writ of certiorari be denied.

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